No. 84-1644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,
v.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF APPELLEE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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STATEMENT OF THE CASE[1]

Factual Background

Pacific Gas and Electric Company ("PG&E"), a regulated "public utility" within the meaning of Cal. Const. art. XII, § 3,

[1] The Commission's initial majority opinion in Decision No. 83-12-047 (Dec. 20, 1983) and its subsequent modifying opinion in Decision No. 84-05-039 (May 2, 1984) are separately reproduced in the appendices to the Jurisdictional Statement ("J.S."), at A1-A34 and A45-A54, respectively. For the convenience of the Court, a single conformed copy of the Commission's decision *as modified* is reproduced in the appendi-

and Cal. Pub. Util. Code § 216, bills its customers for utility service each month by mail and recovers its reasonable costs of billing, including postage, materials, labor and overhead, in rates.

The Public Utilities Commission of the State of California ("the Commission") requires PG&E to enclose each customer's bill in a billing envelope—a practice which creates a medium for delivery not only of the bill but of additional "bill inserts" which may be placed inside the envelope. The billing envelope, the entire space inside the envelope and the capacity of the envelope to carry bill inserts exists solely because the Commission's present regulation of the billing process allows them to exist.[2] If, for example, the Commission were rationally to conclude that billing should be done by postcard (*e.g.*, to save ratepayer postage costs), there would be no billing envelope and hence no medium for the delivery of additional written messages along with the bill.[3] However, the Commission has found that the space in the billing envelope provides an "effective method of communicating with ratepayers" and has "routinely" used that space "to accomplish various informative functions for the benefit of ratepayers." Comm. M.D. A7.[4] Thus, pursuant to present regulatory requirements established or approved by the Commission, PG&E encloses in each customer's monthly billing envelope a bill, a return

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ces to the Commission's Motion to Dismiss ("Comm. M.D."), at A1-A40.

[2] While PG&E's envelopes, bought and paid for by the utility with funds recovered in rates, may be utility property, *see* Comm. M.D. A3, a particular envelope is imbued with the status of a *billing* envelope solely by reason of the Commission's regulation. Moreover, irrespective of the ownership of the envelope, the Commission has traditionally exerted extensive regulatory control over the uses to which the space inside the envelope is put. *Id.* at A7.

[3] This would also be the case if the Commission authorized or required PG&E, like some California utilities, to have its meter readers generate and deliver utility bills in person at the time the meter is read.

[4] The Commission's decision acknowledges, Comm. M.D. A4 n. 2, and PG&E concedes, PG&E Br. 14 n. 11, that there is an "increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately."

envelope and such additional bill inserts as are required by statute[5] or by the Commission.[6]

PG&E's billing envelope and its required contents, taken together, normally weigh a fraction of an ounce.[7] However, present regulations of the United States Postal Service require prepaid postage on each billing envelope in an amount sufficient to cover the delivery of mail weighing a full ounce. Accordingly, PG&E's present billing and postage requirements generate a quantum of weight allotment in the envelope, not normally consumed by the bill or the enclosures otherwise required by the Commission, upon which postage has been prepaid. The Commission has characterized this prepaid quantum of weight allotment as the "extra space" in the billing envelope.[8]

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[5] Cal. Pub. Util. Code § 454; *see also* Cal. Pub. Util. Code §§ 786(b), (c).

[6] *See* note 19, *infra*.

[7] The cumulative weight of these items will of course vary, depending on the number and nature of inserts required for a given month as well as any variations in the billing requirements for individuals or different classes of customers.

[8] The Commission's decision defines the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Comm. M.D. A3.

This definition is not intended to suggest that the Commission has any lesser authority over the other portions of the interior of the billing envelope. The Commission has always regulated "the monthly bill and . . . required legal notices" which consume a portion of the first ounce of mailable matter, and there is no reason why these items might not on some occasion weigh more than an ounce. Moreover, the envelope space remaining after the "extra space" is consumed (*i.e.*, that applicable to the second and subsequent ounces of mailable matter) is properly subject to the Commission's jurisdiction for the same reasons as is the "extra space" itself. *See* Comm. M.D. A7, A12, A32-A33, A37.

Nor is the concept of the "extra space" intended to suggest that the Commission's authority to order the inclusion of "required legal notices" is any different from its authority to permit the inclusion of TURN's

PG&E has traditionally communicated with its customers by enclosing its publication *Progress* in the extra space in the billing envelope. The costs of preparing and printing *Progress* are not included in rates and thus are effectively paid by the company's shareholders. However, under present practice, PG&E recovers 100 percent of its estimated postage costs for billing from the ratepayers. It thus recovers in rates the cost of that postage applicable to the extra space, including that portion of the space occupied by *Progress*.

Moreover, the extra space has economic value to the ratepayers far in excess of its applicable postage costs. If that space were used to generate income—*e.g.*, by selling the use of the space to advertisers—the income generated would likely be very substantial.[9] Such income would engender a corresponding reduction in PG&E's revenue requirement and thus in rates.[10] Accordingly, the exclusive appropriation of the extra space by PG&E without charge results in PG&E's obtaining a windfall measured by the economic value of the space and the ratepayers' bearing opportunity costs for a medium of communication which they underwrite. *See* J.S. A67-68.

Prior Commission Decisions

In an earlier decision, Decision No. 93887 (Dec. 30, 1981), as modified by Decision No. 82-03-047 (Mar. 2, 1982), the Commission considered the claim of Toward Utility Rate Normalization ("TURN"), a frequent intervenor in Commission

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insert. The source of the Commission's power to order the inclusion of both such notices is the same.

[9] There are, of course, legitimate reasons why the Commission might find the sale of advertising space objectionable. Such use would do little to increase public awareness of regulatory issues or public participation in Commission proceedings. Similarly, placing the utility bill in a sheaf of advertisements might impede the convenience and efficiency of the billing process or unduly intrude upon ratepayer privacy.

[10] The Commission's decision concludes that "[q]uantification of the economic value of the extra space is subjective and imprecise because it is based on many variables." Comm. M.D. A33, A4 n. 2.

proceedings, that PG&E had violated the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 2623(b)(5) and 2625(h), by recouping from ratepayers indirect expenditures for political advertising (*i.e., Progress*) in the billing envelope. J.S. A67, A72.

The Commission concluded that the economic value of the extra space in the billing envelope should be "considered as ratepayer property," since the ratepayers create that value by paying the postage for delivery of the entire contents of the envelope. J.S. A67. However, rather than deciding in that proceeding "what steps [it] should take to utilize most efficiently for the ratepayers' benefit the 'extra' space . . . in the billing envelope," J.S. A69, the Commission invited the initiation of a collateral proceeding addressing the question of remedy:

> We invite TURN or any other interested party to file an application with this Commission with a proposed solution to the extra space problem. The application would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the "extra space" more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such application.

J.S. A71.[11]

Thereafter, in Decision No. 83-04-020 (Apr. 6, 1983) ("the UCAN decision"), the Commission approved the establishment of a consumer advocacy group to be called San Diego Utility Consumers Action Network, Inc. ("UCAN") and required San Diego Gas and Electric Co. ("SDG&E") to allow the group to use the extra space in its billing envelope four times per year for a two-year period. J.S. A90-A110. SDG&E did not challenge the

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[11] TURN's petition for writ of review of the Commission's failure to adopt a specific remedy was denied by the California Supreme Court on August 13, 1982. *See TURN v. Public Utilities Commission*, S.F. No. 24415 (Aug. 13, 1982). PG&E elected not to seek judicial review of Decison No. 93887 as modified.

Commission's final order in the courts, and UCAN has utilized SDG&E's billing space on eight separate occasions to solicit membership and funds.

The Decision Below

TURN responded to the Commission's invitation issued in Decision No. 93887 and, on May 31, 1983, filed a new and separate complaint with the Commission (Case No. 83-05-013), seeking access to PG&E's billing envelope for purposes of soliciting funds, increasing membership and informing PG&E ratepayers of energy-related issues affecting their bills. TURN's complaint presented three proposals, the first two of which involved the insertion in PG&E's billing envelope of "checkoff" lists of multiple consumer advocacy organizations and the third of which would grant TURN alone access to the billing envelope.

In Decision No. 83-12-047 (Dec. 20, 1983), as modified by Decision No. 84-05-039 (May 2, 1984), the decision below, the Commission granted TURN access to the extra space in PG&E's billing envelope four times per year for an experimental period of two years,[12] rejecting the "checkoff" proposals because they contemplated the participation of multiple organizations and because TURN was the only organization which had applied for access to the billing envelope. Comm. M.D. A21-A22, A24, A35. In so ruling, the Commission indicated that it was "in no way preclud[ing] other proposals from being considered" and that, alternatively, it might in the future modify its decision "to provide

[12] The Commission concluded that its previous final determination in Decision No. 93887 as to the ownership of the extra space was not properly subject to relitigation by PG&E in this case. Comm. M.D. A36. As noted in earlier filings, under California law, that previous determination of state property law is *res judicata*. *See* Cal. Pub. Util. Code § 1709; Comm. M.D. 8-9, A59.

The Commission also rested its decision, independent of the ownership of the extra space, on its state constitutional and statutory authority to regulate public utilities. Comm. M.D. A6-A8, A12, A32-33, A37.

for the implementation of a checkoff program." Comm. M.D. A24.[13]

The decision provided that PG&E be permitted to use the extra space during the remaining eight months of the year as well as any remaining extra space not used by TURN during the months TURN's material is inserted; that PG&E and TURN each determine the content of its own material; that the costs of inserting material in the extra space be borne by the sponsor of the material; that PG&E bill TURN for all reasonable costs to the company caused by the addition of TURN's material; and that TURN's material clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or by the Commission. Comm. M.D. A38-A39.

On November 4, 1984, the California Supreme Court entered its final order summarily denying PG&E's petition for review. Cal. R. Ct. 24(a). Its order constitutes "a decision on the merits both as to the law and the facts presented in the review proceedings." *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 900, 901, 160 Cal.Rpt. 124, 603 P.2d 41 (1979).

This appeal follows.

SUMMARY OF ARGUMENT

The Commission's decision granting TURN periodic access to the extra space in PG&E's billing envelope constitutes reasonable regulation of a public utility subject to the Commission's jurisdiction. The decision falls within the State's police power, is consistent with the Commission's historical regulation of the billing envelope as an instrumentality of the regulatory process, and rationally furthers important State interests. *See* Parts I(A), (B) and (C), *infra*.

[13] Because TURN was the only applicant for access to PG&E's billing space, the issue of how the competing interests of multiple applicant organizations should be resolved is not raised in this case. *See* Comm. M.D. A21-A22, A24, A35. The sole issue here is whether the Commission violated PG&E's First Amendment rights by granting access to TURN.

The Commission's decision does not infringe upon affirmative speech or editorial discretion protected under the First Amendment. It merely raises the speculative possibility that PG&E may infrequently be required to pay a portion of the cost of delivering its chosen message through the U.S. mail. A State's decision "not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545-546 (1983). Such a determination is merely reasonable economic regulation within the State's police power. *E.g., Munn v. Illinois*, 94 U.S. 113, 125-130 (1877); *New Orleans v. Dukes*, 427 U.S. 297, 303-306 (1976). *See* Parts II(A) and (B), *infra*.

However, even assuming that the Court were to perceive a cognizable restriction on PG&E's affirmative speech, the decision is facially content-neutral, and, since no impermissible content-based discrimination has occurred or is likely to occur in the future, the decision is justified under the applicable standards for permissible content-neutral regulation of affirmative speech. *See* Part II(C), *infra*.

The Commission's decision does not infringe upon any protected rights to refrain from speaking or to refrain from associating with the views of another. The interest underlying the Court's recognition of those "negative" speech and associational rights—"individual freedom of mind"—is not served where the party asserting the claim is an artificial entity, such as a corporation or a regulated public utility; hence the protection of those rights should not, under the circumstances of this case, be extended to PG&E. *See* Part III(A), *infra*.

Moreover, even if such a claim were available to PG&E, the Commission's decision, rather than seeking to compel PG&E's ideological orthodoxy, merely enables a separate and distinct voice, clearly identified as such, to reach consumers. The principles of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), have little applicability to the program established by the Commission's decision. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Zauderer v. Office of Disciplinary Counsel*,

471 U.S. ____, 85 L.Ed.2d 652, 105 S.Ct. ____ (May 28, 1985); *Cornelius v. NAACP Legal Defense Fund*, ____ U.S. ____, 53 U.S.L.W. 5116 (July 2, 1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (9183); *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981). Hence the decision does not infringe upon any negative speech or associational rights. *See* Part III(B), *infra*.

However, even assuming that the Court were to perceive such an infringement, the Commission's decision is justified under the standard of *United States v. O'Brien*, 391 U.S. 367 (1968), or any other test which the Court deems applicable. *See* Part III(C), *infra*.

The Commission's decision does not violate the First Amendment, and the judgment of the California Supreme Court should be affirmed.

ARGUMENT

I

THE COMMISSION'S DECISION CONSTITUTES A PROPER EXERCISE OF THE STATE'S AUTHORITY TO REGULATE THE ECONOMIC ACTIVITY OF PUBLIC UTILITIES

A. Under the Police Power, a State has Broad Authority to Regulate Public Utility Monopolies in the Public Interest.

In *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190, 205 (1983), this Court recognized the State's broad regulatory power over public utilities:

> Justice Brandeis once observed that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." Frost v Corporation Comm'n, 278 US 515, 534, 73 L Ed 483, 49 S Ct 235 (1929) (dissenting opinion). "The nature of government regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a

regulatory body." Jackson v. Metropolitan Edison Co., 419 US 345, 357, 42 L Ed 2d 477, 5 S Ct 449 (1974). See Central Hudson Gas & Electric Corp. v Public Service Comm'n of New York, 447 US 557, 569, 65 L Ed 2d 341, 100 S Ct 2343 (1980) ("The state's concern that rates be fair and efficient represents a clear and substantial governmental interest").

The rationale underlying the State's broad authority is that a public utility is a state-created monopoly, permitted to operate as such solely because of a determination by the State that the public interest is better served by protecting the utility from competition. "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 550 (1980) (Blackmun, J., dissenting). *Accord, Cantor v. Detroit Edison Co.,* 428 U.S. 579, 595-596 (1976) ("[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation"); *see also Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 587-588 (1980) (Rehnquist, J., dissenting).

The California Public Utilities Commission was established for this purpose. "Created by the Constitution in 1911, the Commission was designed to protect the people of the state from the consequences of destructive monopoly in the public service industries." *Sale v. Railroad Commission,* 15 Cal.2d 612, 617, 104 P.2d 38 (1940). *See also General Telephone Co. v. Public Utilities Commission,* 34 Cal.3d 817, 824, 827, 195 Cal.Rptr. 695, 670 P.2d 349 (1983); *Consumers Lobby Against Monopolies, supra,* 25 Cal.3d at 905. As one California Supreme Court Justice recently said: "The Commission stands nearly alone among state agencies as a constitutionally empowered, independent, multifunctioned body whose mandate is to represent and protect the public good." *Cory v. Public Utilities Commission,* 33 Cal.3d 522, 529, 189 Cal.Rptr. 386, 658 P.2d 749 (1983) (Reynoso, J., dissenting).

Under its broad state constitutional and statutory mandate, the Commission may do all things "necessary and convenient" to the exercise of its regulatory power, including the regulation of a utility's rates, services, rules, practices, appliances, equipment, facilities, methods of distribution, methods of transmission and physical property. Cal. Pub. Util. Code §§ 701, 728, 729, 761 and 762; Comm. M.D. A57-A59; *see, e.g., Munn v. Illinois, supra,* 94 U.S. at 125-130; *New Orleans v. Dukes, supra,* 427 U.S. at 303-306; *Nebbia v. New York,* 291 U.S. 502, 523-525, 537 (1934); *Sutter Butte Canal Co. v. Railroad Commission,* 279 U.S. 125, 135-138 (1929); *General Telephone, supra,* 34 Cal.3d at 822-827.

As found by the Commission and the California Supreme Court, this mandate extends to the Commission's order here.

B. California Has Historically Regulated the Utility Billing Process, Including the Billing Envelope and Its Contents, Because of the Inherent Relationship of that Process to All Other Aspects of Utility Rates, Service and Regulation.

As the Court has observed in a somewhat similar context, "[t]he present case is a good example of Justice Holmes' aphorism that 'a page of history is worth a volume of logic.' "*U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 120-121, *quoting New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921). For here, a brief history of the Commission's regulation of the billing envelope as a channel of communication to utility customers is helpful in placing PG&E's First Amendment claim in its proper context.

At the outset, however, it is important to understand that the billing process is integral to utility service and is inextricably entwined with rates. When a customer signs up for service such as that provided by PG&E, he or she is entitled not only to gas and electric power but also to a monthly bill which informs him or her with sufficient specificity of the amount of power used, the rate charged and the amount due. A utility's failure properly and timely to bill its customers may *inter alia* discourage timely payment, deprive the customers of sufficient information to assess the accuracy of the bill, encourage billing disputes, increase the utility's costs of collection, increase uncollectibles or bad debt,

heighten the frequency of customers having their service erroneously discontinued for nonpayment and substantially inconvenience both the utility and its customers. Such failure constitutes "poor management [which] result[s] in injury to those who pay their bills." *Tujunga Water & Power Co.*, 7 Cal.R.R.C. 580, 589 (1915). In addition, such failure will likely necessitate an increase in rates.

One inherent function of the billing process is the provision of information to the customer. Indeed, the bill itself—which is essentially a demand for payment for services rendered—provides the utility customer with a wide variety of information, such as the amount of service used (as itemized in accordance with Commission regulations), the rate charged (as fixed by the Commission) and the date on which the amount of money claimed falls due (as stated in tariff rules subject to Commission approval). The billing envelope may also contain information as to procedures both for disputing the accuracy of the bill and for making payment, as well as a return envelope to facilitate making payment. The envelope also commonly contains notices of rate, billing, or other service changes, notices of the availability of special programs regulated by the Commission and a wide variety of additional messages, some of which may be printed on the face of the bill and some of which may be communicated on a separate insert placed in the billing envelope pursuant to an order of the Commission.

Apart from its use to facilitate the orderly satisfaction of contractual obligations between the utility and its customers, the utility billing envelope provides what this Court has called a "unique forum[ ] for expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981). The envelope provides the means of communicating directly with the class of persons who are the utility's customers and no other. Moreover, the contents of the billing envelope demand the recipient's close attention because they are part of, and may well affect, the ongoing business relationship between the utility and its customer. In California, close scrutiny of the contents of the envelope is demanded in part by the recipient's perception, based on experience, that the State has often used the envelope to communicate messages which are

of considerable importance to the customer. Hence the recipient who fails to scrutinize the contents of the envelope knowingly does so at his or her peril. As acknowledged by the Commission's decision, there is an "increased probability that the recipient will peruse a communication enclosed with the bill over one sent separately." Comm. M.D. A4 n. 2. The envelope thus provides an unusually effective means of communicating with utility customers—a means far more effective than communicating by direct mail with envelopes identifiable as something *other* than the billing envelope.

Indeed, the California Legislature has specifically required each California public utility to include in the billing envelope its notice of filing an application for a rate increase, its statement of the reasons for its seeking the increase and a notice to the consumer of the means by which he or she may receive notice of the time and place of any hearing on the application. Cal. Pub. Util. Code § 454(a). In this way, the Legislature has recognized the inherent effectiveness of the billing envelope as a medium of communication central to the regulatory scheme and has asserted the State's jurisdiction over the envelope as an extension of Commission rate proceedings and an instrumentality of the regulatory process.

The Commission's decision below recognizes the uniquely effective nature of this channel of communication and its role in the regulatory process:

> Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D. 93887)
>
> Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it has become a routine matter. Notices of

applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 29, 1982, p. 3)—so routinely, in fact, that we have referred to extra space as being that space which is available *after* legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various conservation programs (D. 92653) and conservation information (D. 89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D. 93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T. (D. 84-04-053) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

Comm. M.D. A7.

The Commission's assertion of its jurisdiction over the billing envelope as a channel of communication is almost as old as the Commission itself. As early as 1913, the Commission (then known as the California Railroad Commission) ordered a water company "to adopt some method of informing its patrons or consumers of water in writing of the amount of water used in each month, and of the rate and amount to be paid." *Slinack v. Inglewood Water Co.*, 3 Cal.R.R.C. 752, 757 (1913).[14]

Similarly, in *Pacific Gas & Electric Co.*, 17 Cal.R.R.C. 143, 144, 147 (1919), the Commission approved a set of utility tariffs (*i.e.*, rules and regulations), subject to such "changes and amendments as may [thereafter] appear advisable [to the Commis-

[14] The Commission likewise ruled in *Peters-Rhoades Co.*, 27 Cal.R.R.C. 297, 299 (1925), "[w]here the rates and rules of a water utility are based upon monthly payments for service, it is the duty of such a utility to render each consumer a monthly bill."

sion]," requiring that [e]ach bill for electric service will contain on its face" certain specified language.[15] Thus, as early as 1919, the Commission required PG&E to communicate specific information to its customers by what was effectively a bill insert.[16]

Indeed, from the moment the Commission began to regulate rates for utilities, a utility was obliged to use its bill to communicate to its customers the rates *set by the Commission*. Cal. Const. Art. XII, § 6; Cal. Pub. Util. Code §§ 728 and 729; Comm. M.D. A57-A58.

In *Campbell Telephone Co.*, 27 Cal.R.R.C. 251 (1925), the Commission addressed the problem of the inconvenience to telephone subscribers of receiving two separate telephone bills, one for local exchange service from the Campbell Telephone Co. and one for toll service from the Pacific Telephone and Telegraph Co. The Commission concluded that "a more satisfactory relation would result both to the subscribers and applicant [the local exchange carrier] if the latter would handle the billing for toll service to its subscribers." *Id.* at 252. Thus in 1925 the Commission effectively ruled that the local company communicate through its billing process the "message," or demand for payment, of a third party.[17]

[15] The Commission commonly sets the precise terms of a tariff and orders the utility to file it. Such tariffs have the force of law. *Dyke Water Co. v. Public Utilities Commission*, 56 Cal.2d 105, 123, 14 Cal. Rptr. 310, 363 P.2d 326, *cert. denied*, 368 U.S. 939 (1961).

[16] The requirement was stated as follows, 17 Cal.R.R.C. at 147:

"(b) Bills

"(1) Each bill for electric service will contain on the face the following notation: 'See other side for rules regarding payment of bills, disputed bills and discontinuance of service.'

"(2) Each bill for electric service will contain on the back thereof a copy of Rule and Regulation No. 6(b), No.9(a) and No. 11."

[17] The same principle applies today. The Commission recently ruled that the public interest is served by permitting Pacific Bell, the western regional Bell Operating Company, to include with its own bill the bill of

And in *Packard v. Pacific Tel. & Tel. Co.*, 71 Cal.P.U.C. 469, 480 (1970), and *Welch v. Pacific Tel. & Tel. Co.*, 72 Cal.P.U.C. 74, 75 (1971), the Commission required a utility to include on its bill for services a utility user's tax. The demand for payment of the tax, which was collected by the utility and remitted to the taxing municipality, was in essence the speech of a third party.

On many occasions, the Commission has regulated the billing process to ensure that appropriate rate- and service-related information reaches the customer. Such regulation has ranged from merely altering the format of the bill[18] to specifying the wording of bill inserts concerning a wide variety of subjects.[19]

AT&T Communications and/or other long distance carriers. *Pacific Tel. & Tel. Co.*, __ Cal.P.U.C.2d __ (Dec. No. 85-01-010 Jan. 3, 1985).

[18] For example, the Commission has required changes in the format of a utility bill where it concluded that the customer was entitled to fuller itemization of charges, where additional information appeared necessary to assist telephone subscribers in ascertaining whether to rent or purchase their telephones, and where a change was necessary to ensure that customers protesting a utility user's tax would not have service disconnected while pursuing such protests in the courts. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Commission,* Cal. Sup. Ct., S.F. No. 24734, Comm. Answ. to Pet. for Rev., 24 n. 19, and cases there cited.

[19] Recent bill inserts ordered by the Commission have notified telephone subscribers of a lifeline program to ensure universal service in the wake of the AT&T divestiture, have indicated that elderly and handicapped customers may designate third parties to receive notices on their behalf to forestall the improper discontinuance of service, have announced the availability of communications devices for the deaf, have detailed in foreign languages emergency telephone numbers and dialing information, have announced the availability of water conservation devices, have provided information concerning a variety of Commission-approved weatherization and energy conservation programs, have explained the effects of certain legislation on utility rates and have explained the components of utility costs, services and rate increases. *See, e.g.*, Comm. Answ., *supra* note 18, at 24-26 n. 20 (citing a Commission Resolution and Rule and some 31 recent decisions requiring utility bill inserts).

Thus the Commission has long exercised regulatory authority over the billing envelope, including the practice of enclosing bill inserts in that envelope.[20]

C. The Commission's Decision Rationally Furthers Important State Interests.

In its decision, the Commission identified the interests sought to be served by the decision as "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." Comm. M.D. A27. It also indicated that addressing these twin goals—*i.e.*, enhancing the degree of consumer participation in Commission proceedings [21] and expanding the body of regulatory-related information received by consumers[22]—was intended to

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[20] Notably, the use of bill inserts to communicate with utility ratepayers has become so commonplace that even U.S. District Judge Harold H. Greene has exercised the court's equitable powers in the AT&T divestiture case to require the inclusion of an informational bill insert. *See United States v. Western Electric Co.*, 578 F. Supp. 668, 676 (D.D.C. 1983).

The Congress of the United States has used its legislative power to that same end. *See* 16 U.S.C. § 2625(f)(2); 42 U.S.C. § 300g-3(c).

[21] The Commission concluded that without "the opportunity of belonging to an organization which could afford to hire people with the technical expertise to represent their interests in [highly technical Commission] proceedings," Comm. M.D. A20-A21, many individual utility customers might consider their ability to participate in such proceedings "illusory," *id.* at A20. Thus the Commission decided to give ratepayers "an opportunity to be informed of and to support advocacy efforts on their behalf." *Id.* at A21. The decision serves the State's interest in securing the consumers' rights to full and effective participation in Commission proceedings. *See* Cal. Pub. Util. Code § 454.

[22] The Commission's decision was intended to serve the State's interest in furthering the free flow of information to the consumer—the very interest underlying this Court's recognition that utility speech is entitled to constitutional protection, *Consolidated Edison, supra,* 447 U.S. at 533-534; *Central Hudson Gas & Electric Corp., supra,* 447 U.S. at 561-562, and the very interest upon which the State granted public access to private property for expressive purposes in *PruneYard Shop-*

serve the Commission's interest in fulfilling its state constitutional and statutory responsibility to regulate public utilities in the public interest. Under California law, the Commission is dutybound to assure that California public utilities charge rates which are "just and reasonable"; that they provide service which is "adequate, efficient, just and reasonable"; and that they establish rules pertaining to rates and service which are "just and reasonable." *E.g.*, Cal. Pub. Util. Code § 451. The Commission has rationally concluded that enhancing consumer understanding of regulatory-related issues and according ratepayers "an opportunity to be informed of and to support advocacy efforts on their behalf," Comm. M.D. A21, will provide the Commission itself with more complete information from which to make its required regulatory determinations.[23] As noted by the decision, "participa-

ping Center v. Robins, supra, 447 U.S. 74. As stated in the Commission's decision, "[i]t is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." Comm. M.D. A22. Ironically, PG&E is now asserting its interest in "free speech" in order to impede the very constitutional value upon which the Court extended First Amendment protection to utility speech. *Consolidated Edison, supra,* 447 U.S. at 533.

Moreover, giving the customers of a natural monopoly needed information of a type which would normally be provided by an industry controlled by competitive forces is one of the primary justifications for regulation. *See* S. Breyer, *Regulation and Its Reform* 26-28 (1982); P. Joskow & R. Noll, *Regulation in Theory and Practice: An Overview*, in *Studies in Public Regulation* 24-27 (G. Fromm, ed. 1981). Notably, PG&E's practice of enclosing *Progress* in the billing envelope began in the 1920's, *see* PG&E Br. 3, a decade in which, according to one commentator, public utilities seeking to limit public controls on the industry "conducted the 'greatest peacetime propaganda campaign ever conducted by private interests in this country.' " I. Barnes, *The Economics of Public Utility Regulation* 782 (1942). *See generally id.* at 782-815; E. Troxel, *Economics of Public Utilities* 72 (1947).

[23] Respected scholars have noted that the State's legitimate regulatory goals may be subverted by a public utility's manipulation of information. Those scholars suggest that a condition of "information impactedness" between the regulated utility and the regulatory authority—the inability of the regulatory authority to obtain complete information from the utility due to the latter's control of key information sources—may, where

tion by representatives of consumer groups tends to enhance the record in our proceedings," *id.* at A19, and granting consumer groups access to the billing envelope is simply another alternative to "help assure the development of a full and fair record," *id.* at A20. Leaving PG&E with a monopoly on access to the billing envelope forum not only impedes the information and participation interests of consumers but also tends to deprive the Commission of a full record in its proceedings and thus tends to impair the fairness and accuracy of its regulatory determinations.[24]

II

THE COMMISSION'S DECISION PLACES NO COGNIZABLE RESTRICTION ON PROTECTED AFFIRMATIVE SPEECH OR PROTECTED EDITORIAL DISCRETION

A. The Decision Does Not Limit Protected Affirmative Speech.

In *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), the Court extended First Amendment protection to the affirmative speech of a corporation based on the public's interest

opportunistically exploited, lead to the utility's obtaining significant excess profits and even, in some cases, to its "capture" of the regulatory body. B. Mitnick, *The Political Economy of Regulation* 206-214 (1980); R. Schmalensee, *The Control of Natural Monopolies* 47, 59, 102, 126 (1979); S. Breyer, *supra* note 22, at 109-112; P. Quirk, *Industry Influence in Federal Regulatory Agencies* 16-17 (1981).

[24] As was argued to the California Supreme Court, regulation of the extra space is mandated not only by the Commission's authority to regulate the service, practices and property of a public utility but also by its authority to regulate rates. Cal. Pub. Util. Code §§ 728 and 729; Comm. M.D. A57-A58. Since the extra space has economic value measured by its ability to generate income and since the generation of such income would reduce rates, PG&E's exclusive appropriation of the extra space for its own use is equivalent to raising rates without required Commission authorization. Under its authority to regulate rates, the Commission is entitled to regulate the use of a potentially income-generating asset for the ratepayers' benefit. The Commission's decision serves the State's interest in limiting PG&E's "unjust enrichment" flowing from its monopolization of the extra space. Comm. M.D. A3-A4.

in "access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783. In so ruling, the Court noted that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. Similarly, in *Consolidated Edison Co. v. Public Service Commission, supra*, 447 U.S. 530, the Court invalidated an order of the New York Public Service Commission which had banned outright a public utility's use of bill inserts expressing the utility's views on controversial issues of public policy. The Court stated that "Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters." *Id.* at 534 n. 1.[25]

Here, unlike *Bellotti* and *Consolidated Edison,* the State has placed no cognizable restriction on protected affirmative speech. In granting TURN limited access to the extra space in the billing envelope, the Commission's decision specifically states that "PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted." Comm. M.D. A38. Nothing in the decision prohibits PG&E from disseminating *Progress* in the billing envelope, even in the months in which access is granted to TURN, so long as it pays the additional postage costs, if any.

While the inclusion of TURN's insert might conceivably consume the entire extra space on which postage has been prepaid,[26]

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[25] As the Court recognized in *Consolidated Edison, supra,* 447 U.S. at 534 n. 2, and *Bellotti, supra,* 435 U.S. at 777 and n. 12, affording First Amendment protection to the affirmative speech of a natural person serves "the individual's interest in self-expression." That First Amendment interest is not implicated where the speaker is an artificial entity, such as a corporation or a public utility.

[26] There has been no showing, nor is there any reason to suppose, that the inclusion of TURN's insert would ever necessitate the exclusion of *Progress* from the envelope. The probability that the utility's insert and "other inserts that [the utility] might be ordered lawfully to include in the billing envelope" could peaceably coexist in the envelope was noted

thereby necessitating the utility's incurring additional postage costs for the delivery of *Progress* in the same envelope, that is not a constitutionally cognizable restriction on protected affirmative speech. The requirement that PG&E move *Progress* from the "free" (*i.e.,* postage prepaid) portion of the interior of the envelope to that portion necessitating additional postage costs merely eliminates a subsidy which PG&E has conceded the Commission may properly eliminate. *See* PG&E Br. 39; PG&E Br. in Opp. to Mot. to Dism., text at 3 and 2-3 nn. 2 and 3; PG&E Reply Br., Cal. Sup. Ct., S.F. No. 24734, text at 14 and 15 n. 8. The State's decision "not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation, supra,* 461 U.S. at 545-546, and cases there cited. As the Court stated in *Taxation With Representation,* 461 U.S. at 549-550, *quoting Harris v. McRae,* 448 U.S. 297, 316 (1980), " 'although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own making.' "

The Commission's decision here merely raises the possibility that the "free ride" which PG&E and its shareholders have previously enjoyed at the expense of ratepayers may on occasion be lessened.[27] It can hardly be contended that the First Amendment confers a constitutional right on PG&E to have the delivery of its message subsidized by the ratepayers. The denial of a free ride is not a denial of free speech. *Taxation With Representation, supra,* 461 U.S. at 545-546; *Greenburgh Civic Assns., supra,* 453 U.S. at 127; *Consolidated Edison, supra,* 447 U.S. at 543, text at

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by this Court in *Consolidated Edison, supra,* 447 U.S. at 543. Moreover, should a realistic possibility of exclusion ever arise, the utility need only expand the size of its envelope.

[27] It is unlikely that the Commission's decision would eliminate the subsidy entirely on those occasions because, among other things, the marginal cost of stuffing the envelope space applicable to the second ounce of postage is less than that applicable to the first ounce, *e.g.,* the postage applicable to the second ounce is less than the postage applicable to the first ounce, the entire envelope can be stuffed in a single mechanical motion and the stuffing of the second ounce does not require the purchase of an additional envelope.

n. 12; *see also Abood v. Detroit Board of Education,* 431 U.S. 209, 233-236 (1977); *Consolidated Edison, supra,* 447 U.S. at 544 (Marshall, J., concurring) and 551 (Blackmun, J., dissenting).[28]

Thus, should the Commission's decision ever necessitate the relocation of *Progress* from the subsidized space in the envelope to unsubsidized space in the same envelope, that occurrence would have no constitutional significance. It would merely constitute reasonable economic regulation within the State's acknowledged police power. *E.g., Munn v. Illinois, supra,* 94 U.S. at 125-130; *New Orleans v. Dukes, supra,* 427 U.S. at 303-306; *Sutter Butte Canal Co., supra,* 279 U.S. at 135-138. Accordingly, the Commission's decision does not in any significant way limit PG&E's ability to speak in the billing envelope.

Miami Herald Publishing Co. v. Tornillo, supra, 418 U.S. 241, on which appellant relies, is not to the contrary. There the Court struck down as violative of the First Amendment's free press guarantee a Florida statute which accorded political candidates subjected to newspaper criticism the right to equal space for reply.

Although appellant characterizes *Tornillo* as a case involving "the right to refrain from speaking," PG&E Br. 16, it is best understood either as a case which, like *Bellotti* and *Consolidated Edison,* involved a state-imposed restriction on protected affirmative speech or as a case which involved a restriction on the

[28] Even if an allocation of costs and benefits to eliminate the ratepayers' subsidy of PG&E's speech were possible, as PG&E now contends (but without having presented any proof on the point before the Commission), such an allocation would not serve most of the identified interests underlying the Commission's decision, *i.e.,* the dissemination of fuller information to the consumer, the fuller participation of consumer representatives in Commission proceedings, and the Commission's consequent reception of a fuller record in its proceedings, thereby enhancing the accuracy and fairness of its regulatory determinations. Since these interests would not be served by an allocation eliminating any subsidy, such an allocation would not obviate the Commission's policy granting access. As noted previously, the Commission found the quantification of the economic value of the extra space would be "subjective and imprecise because it is based on many variables." Comm. M.D. A33.

editorial freedom of a newspaper. Neither type of restriction is present here.

The Court found a restriction on protected affirmative speech in *Tornillo* in the "right of reply" statute's exaction of a penalty in terms of cost and space allocation from a newspaper based on its affirmative speech content. *Id.* at 256-257. The Commission's decision here exacts no such penalty. First, it assures that PG&E will recover from TURN "all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." Comm. M.D. A39. And second, it requires no alteration of the size and content of *Progress.* Under the decision, PG&E is given complete, unreviewable authority to "determine the content of its own material." Comm. M.D. A38.

In addition, the Florida "right of reply" statute in *Tornillo* was found to have a chilling effect on the newspaper's presentation of those topics which might trigger the application of the statute. *Id.* at 257. "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.* (footnote omitted).

Here, however, no such chilling effect is present. The Commission's grant of access to TURN is not contingent on PG&E's addressing a particular topic which would trigger a right of reply. Under the Commission's decision, access is granted to TURN no matter what PG&E chooses to say in *Progress.* Hence, the grant of access does not chill PG&E's addressing any topic, and PG&E's chosen message is limited only by "the power of the thought to get itself accepted in the competition of the market. . . ." *Consolidated Edison, supra,* 447 U.S. at 534, *quoting Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). By adding a distinct voice to the billing envelope, the Commission's decision serves the same core value underlying the Court's protection of affirmative speech under the First Amendment in *Bellotti, Consolidated Edison,* and *Tornillo — i.e.,* the encouragement of wide-open debate on issues of public importance. Hence, the decision neither " 'dampens the vigor [nor]

limits the variety of public debate.' " *Tornillo, supra,* 418 U.S. at 257, *quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 279 (1964).

B. The Decision Does Not Limit Protected Editorial Discretion

Tornillo may also be characterized as a case involving a restriction on the editorial freedom of a newspaper because there the Court concluded that irrespective of any penalties and chilling effect on the newspaper's speech, the Florida statute constituted an impermissible "intrusion into the function of the editors." 418 U.S. at 258.

Such an intrusion is not involved here because the Commission's decision does not grant access to *Progress* itself; it merely grants access to the billing envelope—the means of delivery by which *Progress,* the bill, the return envelope, and such other separate inserts as are required by statute or by the Commission are carried to the utility customer. Under the Commission's decision, the editors of *Progress* retain complete freedom to address any viewpoint or subject matter, or none at all, within the four corners of their own publication. *See* Comm. M.D. A38. And the grant of access engenders no more interference with the content of *Progress* than it does with the content of the other enclosed notices or the content of the bill. The Commission's order in no way disturbs PG&E's exercise of "editorial judgment" as defined in *Tornillo*—the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials." 418 U.S. at 258.

Tornillo itself strongly supports this view. While the decision repudiates the constitutional validity of state laws which compel the editors or publishers of a newspaper to print that which "'"reason" tells them should not be published,'" *id.* at 254, *quoting Associated Press v. United States,* 326 U.S. 1, 20 n. 18 (1945), it stresses that the publishers of one newspaper may not use their First Amendment freedoms to impede the free speech of others. 418 U.S. at 251-254. Noting that newspapers are not

immune from the antitrust laws, *Tornillo* quotes at length from *Associated Press, supra,* 326 U.S. at 20, as follows:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

418 U.S. at 252.[29]

Mindful of the distinction, PG&E argues that the Commission's decision interferes with its editorial discretion "to select the content of its *billing envelopes.*" PG&E Br. 11 (emphasis added). But that claim is unpersuasive in light of the State's traditional regulation of the billing envelope in the public interest, including its longstanding, never-challenged practice of requiring PG&E to

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[29] Similarly, privately-owned public utilities are exempt from federal antitrust laws only to the extent their anticompetitive conduct is taken pursuant to a clearly articulated state policy and is actively supervised by the State. *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. ____, 85 L.Ed.2d 36, 105 S.Ct. 1721 (Mar. 27, 1985), citing *Parker v. Brown,* 317 U.S. 341 (1943), and *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie v. City of Eau Claire,* 471 U.S. ____, 85, L.Ed.2d 24, 34, 105 S.Ct. 1713, 1720 (Mar. 27, 1985).

include Commission-ordered messages in the envelope alongside *Progress*. Under *Tornillo*, the First Amendment may render the content of *Progress* itself immune from reasonable state regulation, but it cannot render the entire envelope immune; the envelope and the space inside it are by longstanding practice a regulated instrumentality of a heavily regulated commercial enterprise. Indeed, the Court indicated as much in *Consolidated Edison* when it stated that "the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope . . . will not result in a 'cacophony of competing voices.' " 447 U.S. at 543, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969).

If, as this Court has stated, "[*Tornillo*] rests on the principle that the State cannot tell a newspaper what it must print," *PruneYard Shopping Center v. Robins, supra*, 447 U.S. at 88, that principle is not violated by the Commission's decision here. The orderly addition of separate and distinct voices to the envelope does not interfere with the utility's articulation of its chosen message.

C. Even Assuming Arguendo that the Court Perceives an Infringement on Affirmative Speech, the Commission's Decision Satisfies the Standards for the Permissible Content-Neutral Regulation of Affirmative Speech

As indicated above, this is not a case involving a restriction on affirmative speech. Indeed, PG&E has largely abandoned that claim in its brief on the merits. Nevertheless, should the Court perceive a restriction on affirmative speech, the Commission's decision satisfies the standards for the permissible content-neutral regulation of affirmative speech.

1. The Decision is Facially Content-Neutral

The Commission's decision is content-neutral on its face. The decision states: "Currently, no controls are placed on the content of *Progress* and we will not undertake to control the material inserted by TURN." Comm. M.D. A22. And it further orders that "PG&E . . . shall . . . determine the content of its own material." And, as shown above, the decision places no cognizable

limitation on PG&E's ability to address any subject matter or to express any viewpoint. *Consolidated Edison, supra*, 447 U.S. at 536. Thus, unlike in *Consolidated Edison*, the Commission has not in any significant way "limited the means by which [the utility] may participate in the public debate on . . . controversial issues of national interest and importance." *Id.* at 535. The Commission's regulation is plainly content-neutral.

PG&E nevertheless argues that by granting access to TURN, the Commission's decision impermissibly evaluates the content of speech and expresses a preference for the views of TURN over those of PG&E. PG&E Br. 22-24. The argument is unfounded. Under the Commission's decision, PG&E may use the extra space for its communicative purposes at least eight and possibly all twelve months of the year, and the utility retains the ability to enclose *Progress* in the billing envelope (whether or not in the extra space) each and every month of the year. TURN, on the other hand is granted access to the extra space but four times per year. It is difficult to comprehend how this allocation of access demonstrates a Commission preference for TURN's views over those of PG&E.

Moreover, the Commission's decision does not concern itself with the content of the respective messages of PG&E and TURN. It leaves that determination in the hands of the speakers. Comm. M.D. A22, A38. Seeking only to accord the billing envelope's audience of ratepayers "exposure to a variety of views, [not just] that of PG&E," *id.* at A22, it attempts to foster diversity in order to serve the State's interests in public information and debate, consumer participation in Commission proceedings, and, ultimately, the fairness and accuracy of its own regulatory determinations. And it does so explicitly seeking to preserve "the ongoing availability of PG&E's views."

The decision constitutes an "effort, not to abridge, restrict, or censor speech, but rather to facilitate and enlarge public discussion in the [regulatory] process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, First Amendment values." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) *(per curiam)* (footnotes omitted).

2. PG&E's Claim of Inevitable Content-Based Discrimination is Not Before the Court

PG&E also argues that the Commission's decision will inevitably lead it to license speakers based on their viewpoints:

> To carry out the commission's edict, government will be required not only to pick and choose from the multitude of competing groups, but also to resolve the numerous disputes that will inevitably arise because of what the various groups, both political and nonpolitical, will wish to say. Thus, government will license speakers to use the envelope based solely upon what they intend to say.

PG&E Br. 25 (footnote omitted).

The argument is without merit, as will be shown below, but the Court should decline to reach it for two reasons. First, the claim is premature. The Commission's decision does not refuse billing envelope access to anyone, and there is no certainty it will ever do so. *Babbitt v. Farm Workers,* 442 U.S. 289, 303-304 (1979). And second, PG&E, contending that everyone *but it* should be denied envelope access, has no standing to raise the claims of third parties who are its adversaries. *Phillips Petroleum Co. v. Shutts,* ____ U.S. ____, 53 U.S.L.W. 4879, 4881 (June 26, 1985); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. ____, 81 L.Ed.2d 580, 590 n. 6, 104 S.Ct. 2694, 2701 n. 6 (June 18, 1984) ("[R]espondent plainly lacks standing to raise a claim concerning his adversaries' constitutional rights in a case in which those adversaries have never advanced such a claim."); *Harris v. McRae, supra,* 448 U.S. at 320.

3. PG&E's Claim of Inevitable Content-Based Discrimination is Without Merit

Assuming *arguendo,* however, that the Court reaches the merits of this highly speculative claim of inevitable content-based discrimination, the claim should be rejected. The Commission's decision, for substantial and legitimate reasons, establishes a

program of fair access to the billing envelope extra space.[30] In granting access to TURN, the decision denies access to no one, and acknowledges the Commission's receptiveness to the proposals of other applicants.

> [W]e are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.

Comm. M.D. A21-A22; *see also id.* at A11, A24.

Because of the limited nature of the billing envelope forum and the purpose the forum has traditionally served, the Commission may (or may not) be required in another case to make distinctions in access based on speaker identity. But such distinctions have often been upheld by this Court where they were reasonable and not intended to suppress disfavored views.

Thus, in *Regan v. Taxation With Representation, supra,* 461 U.S. at 551, the Court rejected an equal protection challenge to a statutory classification which subsidized the speech of veterans' organizations but not other organizations without applying strict scrutiny. Observing that it found "no indication that the statute was intended to suppress any ideas or any demonstration that it had that effect," *id.* at 548, the Court approved the classification

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[30] With variations, a "fairness" approach to billing envelope access has been endorsed by legal commentators. *See generally* Harrison, *Public Utilities in the Marketplace of Ideas: A 'Fairness' Solution For a Competitive Imbalance,* 1982 Wis. L. Rev. 43 (1982); Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply,* 70 Calif. L. Rev. 1221 (1982); Comment, *Access to Public Utility Communications: Limits Under the Fifth and First Amendments,* 21 San Diego L. Rev. 391 (1984); Note, *Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills,* 64 Va. L. Rev. 921, 931-932 (1978).

because it bore "a rational relation to a legitimate governmental purpose," *id.* at 547.

Similarly, in the context of a nonpublic forum on property owned or controlled by the government, this Court has concluded that the State may "make distinctions in access on the basis of subject matter and speaker identity." *Perry Education Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 49. "These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (footnote omitted). Thus in *Perry* this Court upheld a school policy permitting access to teachers' mailboxes for a union elected by teachers as their exclusive bargaining representative but denying access to a rival union because the policy distinguished between the two unions based on their *status* rather than their views. *Id.*

Moreover, reading the majority opinion in *Perry, id.* at 53, alongside Justice Brennan's dissent, in which three other Justices joined, *id.* at 61 n. 5, 64 n. 8, the Court seems unanimous in the view that distinctions based on speaker identity in a nonpublic forum are permissible where access is restricted to those involved in the "official business" of the particular governmental agency involved. The common thread running between PG&E and TURN, the two organizations granted access by the Commission's decision, is that they are participants in Commission proceedings.[31]

Finally, in another nonpublic forum case, *Cornelius v. NAACP Legal Defense Fund,* ___ U.S. ___, 53 U.S.L.W. 5116, 5121 (July 2, 1985), the Court stated that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of

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[31] *See also Consolidated Edison, supra,* 447 U.S. at 545-546 (Stevens, J., concurring) (noting that there are numerous distinctions based on subject matter and speaker identity in the rules and practices of this Court).

the purpose served by the forum and are viewpoint neutral." *See also U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 132-133 (upholding a content-neutral regulation prohibiting placement of mailable matter not bearing postage in privately-owned mailbox).

In sum, in several contexts, this Court has approved enactments which made distinctions in access which were based on speaker identity but retained their viewpoint-neutral character. The Commission here has demonstrated a sensitivity to the need for developing "neutral criteria to determine eligibility," Comm. M.D. A22, and has committed itself to that end, should the problem arise. Under these circumstances, there is no reason to suppose that the Commission will be unable to administer its fair access program in a constitutionally permissible fashion.

4. The Decision Withstands "Time, Place, and Manner" Analysis.

To the extent the Court perceives the Commission's decision as imposing a restriction on PG&E's affirmative speech, it is sustainable as a "reasonable time, place, and manner" regulation which is content-neutral, serves a significant governmental interest, and leaves open ample alternative channels for communication. *Consolidated Edison, supra,* 447 U.S. at 535.[32] Since the decision does not restrict PG&E's speech based on content, the remaining questions are whether it serves a significant governmental interest and leaves open ample alternative channels for communication. It does both.

First, as noted previously, the Commission's granting TURN access to the extra space in the billing envelope is narrowly tailored[33] to serve several significant governmental interests. It

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[32] In *Clark v. Community for Creative Nonviolence,* 468 U.S. ___, 82 L.Ed.2d 221, 230 and n. 8, 104 S.Ct. 3065, 3071 and n. 8 (June 29, 1984), the Court indicated that a regulation which satisfies the "time, place, and manner" standard also satisfies the test of *United States v. O'Brien, supra,* 391 U.S. at 376-377.

[33] It is difficult to see how the grant of access could be more narrowly tailored. The Commission has taken great pains to leave PG&E's prior

promotes full and effective consumer participation in CPUC proceedings. App. A27, A35, A36. It enhances the accuracy of the fact-finding process by "tend[ing] to enhance the record in [such] proceedings." App. A36. It provides information about consumer organizations to those ratepayers desiring such information and furthers the fuller understanding of energy- and regulatory-related issues by consumers. App. A20-A21, A27, A36. It advances the ratepayers' state and federal constitutional rights to receive ideas and information, based on the assumption "that the ratepayers will benefit more from exposure to a variety of views than they will from only [those] of PG&E." Comm. M.D. A22. It provides added protection for the particular interests of residential ratepayers and other specific ratepayer groups beyond that provided by the Commission's staff (which is charged with representing *all* ratepayers). Comm. M.D. A20. And, by enhancing the record and body of information before the Commission in rate proceedings, it promotes "just and reasonable" rates and service, the overall objective of the regulatory

practice untouched by its regulation. And intervenor funding programs, posited by PG&E as a less restrictive alternative, do not serve the consumer informational interest identified in the decision nor, in the Commission's judgment, do they sufficiently serve the other identified interests. Comm. M.D. A7. The degree to which these interests should be served is a matter for the State. *Clark v. Community for Creative Nonviolence, supra,* 468 U.S. at ____, 82 L.Ed.2d at 231, 104 S.Ct. 3072; *cf. Zauderer, supra,* 471 U.S. at ____ n. 14, 85 L.Ed.2d at 673 n. 14, 105 S.Ct. at ____ n. 14. In addition, putting the space to affirmative use for the benefit of ratepayers was required to serve the State's interests in efficiency and avoiding waste.

Finally, since the *O'Brien* test is functionally equivalent to the "time, place, and manner" test, any "tailoring" requirement of the latter test must be read in light of *United States v. Albertini,* ____ U.S. ____, 53 U.S.L.W. 4844, 4848 (June 24, 1985), in which the Court noted that "an incidental burden on speech is no greater than essential, and therefore is permissible under *O'Brien,* so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

scheme.[34] All of these are legitimate and significant government interests. *See Pacific Gas & Elec. Co. v. Energy Resource Commission, supra,* 461 U.S. at 205; *Central Hudson Gas & Electric Corp., supra,* 447 U.S. at 561-562, 568-569; *Consumers Lobby Against Monopolies, supra,* 25 Cal.3d at 911.

And second, the Commission's decision leaves PG&E with unlimited "alternative channels of communication." 447 U.S. at 535. Every day of the year, if it so desires, PG&E may send as many copies as it pleases of *Progress* or any other publication to its customers, so long as it pays the requisite postage and other costs. Indeed, on the very day that TURN's insert is enclosed in the billing envelope, PG&E may send unlimited materials in rebuttal either in the billing envelope or under separate cover. In sum, PG&E, as sole owner of its customer list, has an unlimited direct mail forum to its customers so long as it underwrites the cost of delivery. This constitutes "ample alternative channels for communication."

However, organizations such as TURN have no comparable channel of communication. While they may advertise in the media in ways generally available to the public, they do not have PG&E's customer list and hence have no way of reaching *precisely* that audience of 4.2 million ratepaying bill recipients.[35] Nor

[34] The decision also serves the State's related interest in limiting PG&E's unjust enrichment by reason of its monopolization of and refusal to share the extra space. Comm. M.D. A3-A4.

[35] It is doubtful whether PG&E can properly disclose, or be ordered to disclose, to private groups the names and addresses of its customers. Cal. Const. art. I, § 1, explicitly guarantees the right of privacy to all California citizens, and only recently, in *People v. Chapman,* 36 Cal.3d 98, 113, 201 Cal.Rptr. 628, 679 P.2d 62 (1984), the California Supreme Court held that a utility customer had a reasonable expectation of privacy in unlisted information concerning his name and address, and that the warrantless disclosure of this information violated the search and seizure provisions of Cal. Const. art. I, § 13. Accordingly, the Commission's decision here appears to be the only reasonable way of granting other voices access to the direct mail forum while accommodating the state constitutional privacy rights of the ratepayers. The State, of course, has a significant, if not compelling, interest, *see Widmar v.*

do such organizations have a way of reaching that "captive" audience in a manner which demands its special attention to their message. *See* Comm. M.D. A4 n. 2.

By granting TURN access to the extra space in the billing envelope four times a year, the Commission has adopted a reasonable time, place, and manner regulation narrowly tailored to serve a significant governmental interest and leaving PG&E ample alternative channels for communication. *E.g., Perry Education Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 45; *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 132; *Consolidated Edison, supra,* 447 U.S. at 535-536.

5. The Decision Constitutes Permissible Regulation of a Nonpublic Forum.

However, the traditional "time, place, and manner" test, though plainly satisfied by the Commission's decision, may actually be more stringent than the test applicable here because the space in the billing envelope is not, nor has the Commission ever treated it as, an unlimited "public forum." The billing space is a nonpublic forum over which the Commission, by its broad regulatory powers, has "the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry, supra,* 460 U.S. at 49. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (footnote omitted).

In *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. 114, the Court considered the constitutionality of a federal statute which provided that a citizen's privately-owned mail receptacle regulated by the U.S. Postal Service not be used for the delivery of mailable matter on which postage had not been paid. Noting that no person is required to provide a mailbox, the Court observed that "[w]hat the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service." *Id.* at 126 (emphasis in original).

Vincent, 454 U.S. 263, 275-276 and n. 17 (1981), in complying with its own constitution.

Eschewing the "time, place, and manner" analysis applied to traditional public forums," *id.* at 132, the Court concluded that the governmentally-imposed postage requirement for the use of privately-owned mailboxes was permissible simply because it was "both reasonable and content-neutral." *Id.* at 131 n.7 and 133.[36]

The billing envelope forum here, like the mailbox forum in *Greenburgh,* is a nonpublic forum on property owned or controlled by the government. The history and scope of the Commission's regulation of the billing envelope make plain that, irrespective of its ownership, the envelope is property subject to the State's broad regulatory control, and the Commission's decision strongly suggests that its intent was to create a nonpublic forum. *Compare Cornelius v. NAACP Legal Defense Fund, supra,* 53 U.S.L.W. at 5120-5121. Accordingly, any perceived restriction on PG&E's affirmative speech is permissible so long as it is reasonable and not an attempt to suppress PG&E's viewpoint because the Commission disagrees with its views. *Id.* at 5121; *Perry, supra,* 460 U.S. at 49. The decision is therefore sustainable as permissible regulation of a nonpublic forum.[37]

[36] "Public property which is not by tradition or designation a forum for public communication may be reserved by the state 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'" *City Council v. Taxpayers for Vincent,* ____U.S. ____, 80 L.Ed.2d 772, 793, 104 S.Ct. 2118, 2134 (May 15, 1984), *quoting Perry, supra,* 460 U.S. at 46.

[37] Moreover, if the Court were to perceive a content-based restriction on PG&E's affirmative speech, the state interests asserted are sufficiently important to justify the regulation. The Commission's decision, carefully crafted to ensure PG&E's unfettered voice in the envelope and to ensure that TURN's voice will not be misidentified as that of PG&E, is obviously not intended to have, nor does it have, an effect of suppressing PG&E's speech because the State disagrees with its views.

III

THE COMMISSION'S DECISION PLACES NO COGNIZABLE RESTRICTION ON PROTECTED RIGHTS TO REFRAIN FROM SPEAKING OR TO REFRAIN FROM ASSOCIATING WITH THE VIEWS OF ANOTHER

A. The Interest Underlying the Court's Recognition of Negative Speech and Associational Rights Is Not Strongly Implicated Where the Speaker is a Corporation or a Regulated Public Utility

In *Bellotti, supra,* 435 U.S. at 783, in which the Court extended First Amendment protection to the affirmative speech of a corporation, the Court was careful to note that it was not reaching the question "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *Id.* at 776. Indeed, the Court specifically reserved the question "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.* at 777-778 n. 13. And the Court further noted that "[w]hether or not a particular [constitutional] guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.* at 779 n. 14.

The interest underlying the First Amendment rights to refrain from speaking and to refrain from associating with the views of another (*i.e.,* negative speech and associational rights) is very different from the broad societal interest identified in *Bellotti, Consolidated Edison,* and *Tornillo* as the basis for affording constitutional protection to the affirmative speech of a corporation. That interest is the individual's interest in the privacy, sanctity and integrity of his personal thoughts and beliefs—"the notion that *an individual* should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Board of Education, supra,* 431 U.S. 235 (emphasis added).

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, supra, 319 U.S. at 642.

This Court has described this interest variously as "the right of freedom of thought," *Wooley v. Maynard, supra,* 430 U.S. at 714; "individual freedom of mind," *id., quoting Barnette, supra,* 319 U.S. at 637; "freedom to be intellectually or spiritually diverse," *id.* at 641; "individual belief and association," *Elrod v. Burns,* 427 U.S. 347, 371 (1976); and, most recently, in *Wallace v. Jaffree,* ____ U.S. ____, 53 U.S.L.W. 4665, 4668 (June 4, 1985), as "the individual's freedom of conscience"—"the central liberty that unifies the various clauses in the First Amendment." *See id.* at 4668 n. 35.

However this important First Amendment interest is described,[38] it plainly concerns the minds and spirits of natural persons and, as a consequence, is not strongly implicated where the party asserting it is a mere artificial entity such as a corporation or a regulated public utility.

The cases upon which PG&E relies support this view.[39] In *Barnette, supra,* the Court invalidated a state statute which

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[38] As Justice Brandeis wrote in his oft-quoted dissent in *Olmstead v. United States,* 227 U.S. 438, 478 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

[39] As discussed more fully above, *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. 241, is different from the other cases on which

compelled individual public school students daily to engage in public ceremonies honoring the flag both by reciting a pledge of allegiance and by traditional salutes. The Court concluded that the statute invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642.

In *Wooley v. Maynard, supra,* the Court concluded that a State may not constitutionally "force[ ] *an individual,* as part of his daily life," 430 U.S. at 715 (emphasis added), to disseminate the State's ideological message by displaying it on his automobile license plate.

And in *Abood, supra,* 431 U.S. at 235, the Court held that the State may not require *an individual* to contribute to the support of an ideological cause he may oppose as a condition of his public employment.[40]

The argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the right to remain silent embodied in the Fifth Amendment privilege against compulsory self-incrimination and the constitutional right to privacy—have been denied to corporations based on their corporate status. *See generally Bellotti, supra,* 435 U.S. at 779 n. 14, and cases there cited.

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appellant relies in asserting its claimed negative speech rights because *Tornillo,* unlike this case, involved a statute which impeded the free flow of information to the public by interfering with the editorial judgment of the publishers of a newspaper.

[40] PG&E's negative associational claim based on *Abood* implicates the same aura of individual autonomy as does its negative speech claim. As the Court noted in *Roberts v. United States Jaycees,* 468 U.S. ____, 82 L.Ed.2d 462, 472-473, 104 S.Ct. 3244, 3250-3251 (July 3, 1984): "As a general matter, only relationships with these [personal] sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection."

In sum, the sole interest underlying the recognition of First Amendment negative speech and associational rights is a "purely personal" interest—"individual freedom of mind." That interest is not strongly implicated where the party asserting it is an artificial entity such as a corporation. Moreover, since the sole interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas—an interest not served by silence—there is no reason to conclude that the First Amendment protects a corporation from being compelled to speak where such a requirement rationally serves the State's legitimate ends. *E.g., Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at ____, 85 L.Ed.2d at 672-673, 105 S.Ct. at ____.[41]

Moreover, if the First Amendment interest in "individual freedom of mind" is not strongly implicated by the State's compelling a corporation to speak, it is even less strongly implicated where the speaker is a regulated public utility. Under California law, any claimed sphere of corporate autonomy is largely surrendered to the extensive regulatory interests of the State at the time the utility is granted monopoly status. *General Telephone, supra,* 34 Cal.3d at 824-828.[42] As the California Supreme Court noted in *General Telephone, supra,* 34 Cal.3d at 826 n. 11, *quoting Gay Law Students Assn. v. Pacific Tel. & Tel. Co.,* 24 Cal.3d 458, 469-470, 156 Cal.Rptr. 14, 595 P.2d 592

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[41] Notably, in *PruneYard Shopping Center v. Robins, supra,* 447 U.S. at 85-88, the Court swiftly rejected the claim of the private owner of a shopping center that the state's granting members of the public access to his private property for expressive purposes violated his First Amendment right to refrain from speaking, distinguishing *Wooley* and *Barnette.*The argument had far more force in *PruneYard,* where the property owner was an individual person, than it does here, where the "owner" of the billing envelope is the largest privately-owned gas and electric public utility in the United States.

[42] PG&E nowhere explains why its asserted sphere of corporate autonomy, if such a realm exists, is not violated by the State's longstanding, never-challenged practice of requiring it to enclose in its billing envelope state-ordered messages which the State deems to be in the public interest.

(1979), the California regulatory scheme leaves little in the way of private corporate autonomy to its regulated public utilities:

> Enroute to our conclusion in *Gay Law Students,* we also noted: "[T]he nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation. Both the prices which a utility charges for its products or services and the standards which govern its facilities and services are established by the state (Pub. Util. Code, §§ 728, 761); in addition, the state determines the system and form of the accounts and records which a public utility maintains and it exercises special scrutiny over a utility's issuance of stocks and bonds. (*Id.,* §§ 792, 816.) Finally, the state had endowed many public utilities, like PT&T, with considerable powers generally enjoyed only by governmental entities, most notably the power of eminent domain. (*Id.,* §§ 610-624.) *Under these circumstances, we believe that the state cannot avoid responsibility for a utility's systematic business practices and that a public utility may not properly claim prerogatives of 'private autonomy' that may possibly attach to a purely private business enterprise."*

(Emphasis in original.)

Accordingly, under the circumstances of this case, PG&E has no cognizable negative speech and associational rights protected under the First Amendment.

B. Even if PG&E May Assert Negative Speech and Associational Rights, Such Rights are Not Violated Here

Even assuming that a public utility possesses some sphere of corporate autonomy upon which a state-ordered compulsion to speak might impermissibly intrude, no such intrusion is involved here.

In *PruneYard Shopping Center v. Robins, supra,* 447 U.S. 74, the private owner of a shopping center sought to exclude persons distributing pamphlets from his property, contending that he had "a First Amendment right not to be forced by the State to use his

property as a forum for the speech of others." 447 U.S. at 85 (footnote omitted). This Court rejected the claim, concluding that a State may exercise its police power to adopt reasonable restrictions on private property without violating the First Amendment so long as the views of those distributing pamphlets were not likely to be identified with the views of the owner, the State had dictated no particular message to be distributed, and the owner was free to disassociate himself from the views of the speakers. *Id.* at 85-88. The Court in *PruneYard* swiftly distinguished *Wooley* and *Barnette,* 447 U.S. at 87, and it may do so here for the same reasons.[43]

None of the four characteristics which *PruneYard* ascribed to *Wooley* is present here. First, this is not a case in which "the government itself prescribed the message." Here the State has refused any entanglement whatsoever in the content of TURN's message ("PG&E and TURN shall each determine the content of its own material") and has taken affirmative steps to ensure that the message will not be interpreted as one prescribed by the State ("All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by . . . this Commission").

Second, the property involved here is not personal property used as part of an individual owner's daily life, as was the automobile in *Wooley.* It is the heavily regulated monthly billing envelope of the largest privately-owned gas and electric public utility in the country, a traditional forum for state-ordered speech and an important instrumentality of the regulatory process. Indeed, any intrusion on personal autonomy here is far less than in *PruneYard* itself, where the owner of the shopping center was a natural person and the property was not the central communications medium of a heavily regulated industry.

Third, the State has not barred PG&E from disassociating itself from the message. The utility is of course free to "expressly

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[43] Notably, this Court recently cited *PruneYard* for the proposition that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. United States Jaycees, supra,* 468 U.S. at ____, 82 L.Ed.2d at 476, 104 S.Ct. at 3254.

disavow any connection with the message," as was the shopping center owner in *PruneYard*, 447 U.S. at 87, but here, unlike the owner in *PruneYard*, PG&E need not do so because here the State has expressly required TURN, as a condition of its access, to inform the public that its message has been "neither reviewed nor endorsed by PG&E." *See also FCC v. League of Women Voters*, 468 U.S. ____, 82 L.Ed.2d 278, 301, 104 S.Ct. 3106, 3125-3126 (July 2, 1984) (acknowledging the effectiveness of disclaimers which identify the speaker).

And fourth, the State's asserted interests justifying the intrusion here are indeed important while in *Wooley* there was "no important state interest." 447 U.S. at 87.[44]

Barnette is distinguishable for much the same reasons. That case "involved the compelled recitation of a message containing an affirmation of belief." 447 U.S. at 88. Such was not the case in *PruneYard*, *id.*, nor is it here.[45]

Moreover, this case, for several additional reasons, presents a less severe intrusion on negative speech rights than *PruneYard*, in which this Court rejected the negative speech claim. First, any "intrusion" here is merely "occasional"—four times per year—rather than daily, as in *PruneYard*. Second, the property in *PruneYard* was privately owned, while here the extra space in the billing envelope is "ratepayer property"[46] as well as property traditionally subject to extensive governmental control. Third, the intrusion here is narrower in scope than that in *PruneYard;* rather than creating a public forum, the Commission here has merely created a nonpublic forum consistent with its regulatory mission and the purposes that the billing envelope has traditionally served.

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[44] *See also League of Women Voters, supra*, 468 U.S. at ____, n. 16, 82 L.Ed.2d at 295 n. 16, 104 S.Ct. at 3120 n. 16 (distinguishing *Wooley*).

[45] *PruneYard* also distinguished *Tornillo* as a case involving a restriction on affirmative speech or as one involving a restriction on the editorial freedom of a newspaper. 447 U.S. at 88. The Court said: "These concerns obviously are not present here." *Id.*

[46] *See* note 12, *supra*.

And fourth, the decision here promotes not only the free speech interests which were the justification for the intrusion in *PruneYard*, but also the consumer participation and regulatory interests articulated in the Commission's decision. *PruneYard*, then, presented a harder case than this one.[47]

Another helpful analogy is provided by *Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. ____, 85 L.Ed.2d 652, 105 S.Ct. ____. In *Zauderer*, this Court concluded in the context of commercial speech (*i.e.*, lawyer advertising) that a state-ordered disclosure requirement is constitutionally permissible so long as it is "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 673 (footnote omitted). In so ruling, the Court said:

> Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. . . . Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech. See, e.g., Wooley v Maynard, 430 US 705, 51 L Ed 2d 752, 97 S Ct 1428 (1977); Miami Herald Publishing Co. v. Tornillo, 418 US 241, 41 L Ed 2d 730, 94 S Ct 2831 (1974). Indeed, in West Virginia State Bd. of Ed. v Barnette, 319 US 624, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674 (1943), the Court went so far as to state that "involun-

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[47] PG&E's negative associational claim based on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is similarly without merit. *Abood* held that an individual may not be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. But here the Commission's decision provides that "[c]osts of inserting materials in the extra space shall be borne by the sponsor of the materials [and] PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." Comm. M.D. A38-A39. Moreover, the postage costs attributable to the extra space are paid by the ratepayers, not PG&E.

tary affirmation could be commanded only on even more immediate and urgent grounds than silence." Id., at 633, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674.

But the interests at stake in this case are not of the same order as those discussed in Wooley, Tornillo, and Barnette. Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id., at 642, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see Virginia Pharmacy Board v Virginia Citizens Consumer Council, Inc., 425 US 748, 48 L Ed 2d 346, 96 S Ct 1817 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." In re R. M. J., 455 US, at 201, 71 L Ed 2d 64, 102 S Ct 929. Accord, Central Hudson Gas & Electric, 447 US, at 565, 65 L Ed 2d 341, 100 S Ct 2343; Bates v State Bar of Arizona, 433 US, at 384, 53 L Ed 2d 810, 97 S Ct 2691, 5! Ohio Misc 1, 5 Ohio Ops 3d 60; Virginia Pharmacy Bd., supra, at 772, n 24, 48 L Ed 2d 346, 96 S Ct 1817.

Id. at 672 (emphasis in original).

Zauderer provides a close analogy to the present case, for here the State has reasonably concluded that presentation of more than one voice in the billing envelope will serve the informational

needs of the public and, ultimately, those of the Commission itself. Since the extension of First Amendment protection to corporate speech is justified principally by society's interest in discussion, debate, information and ideas, *Bellotti, supra,* 435 U.S. at 783, a public utility's interest in *not* permitting the presentation of other distinct views in the billing envelope, clearly identified as those of the speaker, is minimal. The State need not judge PG&E's speech or characterize it as "deceptive" or "misleading" to rationally conclude that opening the medium to more voices and, inevitably, greater diversity will serve society's interest in robust, uninhibited debate in the marketplace of ideas. *See* note 22, *supra.*

Moreover, in many ways disclosure requirements are more intrusive on negative speech interests than the limited fair access program established here. First, disclosure requirements, unlike the grant of access here, normally alter the content of the speaker's affirmative speech. Second, since the disclosure is contained in the body of the affirmative speech, unlike TURN's message here, it may often be perceived as the speech of the speaker. Third, the disclosure normally contains specific language prescribed or dictated by the State. And fourth, as noted in *Zauderer, id.* at 673, "unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," while here, as shown above, there is no chilling effect on PG&E's protected speech because the decision grants access to TURN no matter what PG&E says in *Progress.*[48]

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[48] An additional analogy is provided by cases involving the broadcast spectrum. *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. 367; *CBS, Inc. v. FCC,* 453 U.S. 367 (1981); *see also FCC v. League of Women Voters, supra,* 468 U.S. at ____, 82 L.Ed.2d at 301-303, 104 S.Ct. at 3126-3127. While *Consolidated Edison* distinguished *Red Lion* because it involved the regulation of a scarce, publicly owned resource, 447 U.S. at 543, the Court's equating the utility billing envelope to the medium of private correspondence sent through the mails is less supportable on this record, in which the Commission has found the billing envelope to be a *more effective* means of communicating with ratepayers because it is the *billing* envelope. *E.g.,* Comm. M.D. A7, A4 n. 2. Moreover, the Court's distinction of the billing envelope from the broadcast spectrum in

The Commission's decision does not violate any cognizable negative speech or associational rights of PG&E.

C. Even Assuming Arguendo that the Court Perceives an Infringement on Protected Negative Speech and Associational Rights, the Asserted State Interests are Sufficiently Important to Justify the Infringement

In *Wooley v. Maynard, supra,* 431 U.S. at 716, the Court applied the test of *United States v. O'Brien, supra,* 391 U.S. at 376-377, in assessing whether the State's interest in infringing upon negative speech rights was sufficiently important to justify the intrusion.

Under the *O'Brien* test, "[a]pplication of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

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Consolidated Edison rested in large part on the capacity of the envelope to accommodate "other inserts that [the utility] might be ordered lawfully to include in the billing envelope." 447 U.S. at 543.

As noted in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 389 (1969):

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . .

And in *CBS, Inc. v. FCC, supra,* this Court upheld, as against a First Amendment challenge by a broadcast network, a federal statute creating a limited right of reasonable access to the broadcast media for candidates for federal office. In so ruling, the Court quoted from *Red Lion, supra,* 395 U.S. at 390, as follows:

> *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

453 U.S. at 395 (emphasis in original).

suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. Albertini, supra,* 53 U.S.L.W. at 4847. As shown previously, the Commission's decision furthers important governmental interests unrelated to the suppression of free expression. *See* Part I(C), *supra.* And the decision does so in a way that "is no greater than essential to the furtherance of [those] interest[s]" because the interests "would be achieved less effectively absent the regulation." *Albertini, supra,* 53 U.S.L.W. at 4847. The State's regulation here satisfies the *O'Brien* standard or any other test which the Court deems applicable.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

JANICE E. KERR
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